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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/806,554	03/23/2004	Len C. Kretchman	SMEE2 12271-5-1	2558

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EXAMINER

TRAN LIEN, THUY

ART UNIT PAPER NUMBER

1761

DATE MAILED: 09/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/806,554	Applicant(s) KRETCHMAN ET AL.	
	Examiner Lien T Tran	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 13-42 is/are pending in the application.
- 4a) Of the above claim(s) 13-24 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 25-42 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1761

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 13-24, drawn to a sandwich product, classified in class 426, subclass 94.
- II. Claims 25-42, drawn to a method of making a sandwich, classified in class 426, subclass 275.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case, the process as claimed can be used to make other and materially different product such as filled pasta product.

Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II or vice versa, restriction for examination purposes as indicated is proper.

During a telephone conversation with Robert Vickers on August 31, 2004 a provisional election was made without traverse to prosecute the invention of Group II, claims 25-42. Affirmation of this election must be made by applicant in replying to this Office action. Claims 13-24 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one

Art Unit: 1761

or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Claims 39-40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 39-40 are indefinite because the claims are unclear. On line 1, the phrase " wherein at least partially cutting off" is unclear because it is not known what is being cut off"; it is unclear how this limitation ties in with the rest of the claim.

Claims 26, 31-32 and 33-40 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In the preliminary amendment filed 3/23/04, applicant submits new claims 25-42. The limitations in the above cited claims are not disclosed in the specification or the original claims. For example, the specification does not disclose anything about the water activity of the first and second food spreads. The specification does not disclose that the depressions are generally spaced an equal distance from one another. The specification does not disclose a platen having a central portion and a pressure surface, moving an upper pressure plate having a cutting edge and a lower pressure surface

Art Unit: 1761

toward the pressure surface of the platen and partially contacting the cutting edge against the pressure surface of the platen.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 25-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over the book "Pasta, Pies and Pastries" in view of the article in "The Wichita Eagle".

In the book "Pasta, Pie, and Pastries" Ursula Kaiser teaches to use the Tartmaster and the Krimpkut sealer to cut, seal and crimp all at the same time. The basic bread method on page 7 teaches placing a filling on a first bread layer, covering the filling with a second bread layer, placing the Tartmaster over the mound of filling and pressing out tart. On page 11, it is disclosed to use bread including white, whole wheat or rye and the filling can vary including peanut butter, jam or jelly, cheese etc. Page 115 shows a round sandwich in which the edges are crimped. The book also shows that the Tartmaster has a cutting cylinder outside and a sleeve with notches for crimping

Art Unit: 1761

inside the cutting cylinder. The slices of bread are cut in unison and the crusts are removed as shown on page 43. The pictures on the page 10 and the front page show that the crimped edge is not right at the edge and space inwardly from it.

The cookbook does not teach the step of encapsulating a second food spread between a first and third layers of a first food spread as in claim 1, the water activity as in claim 26, the first food spread being nut butter and the second food spread being jelly as in claims 27-28, using a platen having a pressure surface and a central portion as in claims 33-34 and contacting against the pressure surface of the platen as in claims 35-40 and inserting the sandwich in an air tight package as in claims 41-42.

The article in the "Wichita Eagle" teaches to prevent soggy bread when making peanut butter and jelly sandwich by spreading peanut butter on both pieces of bread and put the jelly in the middle.

It would have been obvious to one skilled in the art to have different layers of filling materials to obtain different flavor and taste. It is notoriously well known that peanut butter and jelly go together and are often used together in sandwiches. When the fillers are peanut butter and jelly, it would have been obvious to encapsulate the jelly between the peanut butter layers to prevent the bread from becoming soggy as taught by the article in the "Wichita Eagle". As to packaging, it would have been obvious to package the product if long term storage is intended and if the product is to be put on the market. It would also have been obvious to one skilled in the art to use a plate or some other form of surface to place the bread slices for sanitary reason and also to facilitate the cutting. It would have been obvious to use a surface or plate which has

Art Unit: 1761

enough clearance for the bread slices such that the Tartmaster can easily cut through the slices. The selection of the type of plate or surface having specific features can be determined by one skilled in the art through routine experimentation to obtain the most optimum working surface to form the bread product. As to the pressure surface of the platen, any surface that is used and the Tartmaster is pushed against it can be considered a pressure surface. Applicant has not defined or claimed any feature that constitutes the pressure surface. The Tartmaster has an outer cutting cylinder and inside notches; these are equivalent to the claims upper pressure plate and lower pressure surface in claims 35-36. The selection of a working surface is a matter of choice. Applicant has not shown any unexpected result or criticality with respect to the platen. The end product as obtained in the prior art process is the same the product obtained from the claimed process. The product made using the steps of the cookbook produces a product with crimped edge and spaced pressure points.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Tuesday, Wednesday and Friday.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 1761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

August 31, 2004


LIEN TRAN
PRIMARY EXAMINER
